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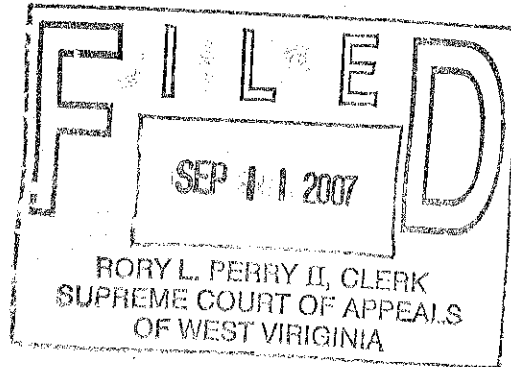
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

GREGORY J. MUTO, by
his Administrator and next friend,
LINDA MUTO
and LINDA MUTO, his widow
Plaintiffs,

Record No. 33506

v.

LARRY SCOTT, Individually,
and
L. SCOTT LTD. CO.
and
LARADO CONSTRUCTION SALES, LLC.
Defendants.



**BRIEF OF DEFENDANT LARRY SCOTT, INDIVIDUALLY, AND L.
SCOTT LTD. CO. AND LARADO CONSTRUCTION SALES, LLC**

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ISSUE

Whether an amended complaint, filed after the expiration of the statute of limitations under W. Va. Code § 55-2-12, relates back to the date of the filing of the original complaint where the Plaintiff names only a fictitious "John Doe" defendant and concedes lack of knowledge of the identity of the proper defendants at the time of filing suit.

PROCEDURAL HISTORY

On July 4, 2004, Gregory Muto and his wife, Linda Muto, leased a cabin located at Smoke Hole Log Cabins in Grant County, West Virginia. Sometime during the evening hours of July 4, 2004, Mr. Muto fell into a ditch located on the property, and claims injury from his fall.

On June 29, 2006, Ms. Muto ("Plaintiff"), as Mr. Muto's Administrator and next friend, filed a Complaint on behalf of her deceased husband¹ and herself for the injuries he sustained. This June 29, 2006 Complaint named "John Doe Contractors, Architects, Consultants, Designers and Engineers for concrete work, construction, design, installation, excavation, and other aspects of building and construction" as Defendants in the case. No other parties were named as Defendants in the Plaintiff's June 29, 2006 Complaint. On October 2, 2006, more than two months past the expiration of the statute of limitations for Mr. Muto's injury, the Plaintiff filed an Amended Complaint naming for the first time Larry Scott, L. Scott Ltd. Co., and Larado Construction Sales, LLC, as Defendants.

On November 2, 2006, the Defendants filed their Motion to Dismiss, on the basis that the Plaintiff's Amended Complaint did not relate back to the date of the original Complaint and therefore, because the Amended Complaint was filed after the expiration of the statute of limitations, the case must be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. On January 3, 2007, the Plaintiff filed her Response to Defendant's Motion to Dismiss, arguing that the Plaintiffs filed their civil action against Defendants within the two year statute of limitations for personal injury actions and that following the amendment of the Plaintiff's Complaint, the same was served upon the Defendants within 120 days. Thus, the Plaintiff argues, the Defendants were served in the time provided by Rule 4(k) of the West Virginia Rules of Civil Procedure. The Plaintiff also argues that she was permitted to amend her complaint under Rule 15(a) of the Rules of Civil Procedure at any time prior to the filing of a responsive pleading and since no responsive pleadings was been filed in this case, the Plaintiff's amendment of her Complaint was timely and proper.

¹ Neither complaint alleged that Mr. Muto's death was caused by his injury which is subject of this suit.

On January 9, 2007, a hearing on the Defendants' Motion to Dismiss was heard before The Honorable Philip Jordan in the Circuit Court of Grant County. On January 16, 2007, Judge Jordan entered an Order Granting Defendants' Motion to Dismiss the Plaintiff's complaint against them. In his Order, Judge Jordan found that the Plaintiff failed to meet the requirements for relating her amended complaint back to the filing date of her original complaint. Consequently, Judge Jordan found that the Plaintiff filed her complaint against the Defendants after the expiration of the statute of limitations.

On May 18, 2007, the Plaintiff filed her Petition for Appeal in this case. On June 27, 2007, the West Virginia Supreme Court of Appeals granted the Plaintiff's Petition for Appeal. The Defendants now submit their Brief in opposition to the Plaintiff's Brief.

STATEMENT OF THE CASE

Whether the ten-year statute of repose for deficiencies, injuries, or wrongful death resulting from any improvements to real property described in West Virginia Code § 55-2-6a (1983) applies in this case is irrelevant under West Virginia law. Regardless of whether or not it applies, under West Virginia law, pre-existing statute of limitations for both contract and tort actions continue to operate within the outside limits set by the statute. This means that the two year statute of limitations for personal injury found under W. Va. Code § 55-2-12 (1959) is still applicable. Thus the sole issue before this Court should be whether the Amended Complaint naming the Defendants in this case relates back to the June 29, 2006 filing and thus complies with the applicable two-year statute of limitations. It does not.

The Plaintiff admits that when she filed her original Complaint, she lacked the knowledge as to the proper parties to name as Defendants. Rule 15(c)(3) of the West Virginia

Rules of Civil Procedure requires, among other things, that the defendant named in the amended complaint either knew or should have known that he or she would have been named in the original complaint had it not been for a mistake. In analyzing this requirement of a mistake on the part of a plaintiff, most courts have held that a lack of knowledge regarding the identity of the proper party does not constitute a mistake. The mistake requirement under Rule 15(c)(3) is not met when a plaintiff substitutes a named defendant for a John Doe defendant in the original complaint. Thus, because the Plaintiff in this case has admitted a lack of knowledge as to the proper defendants, the Amended Complaint does not relate back to the date of the filing of the original Complaint. Because the Amended Complaint was filed after the two year statute of limitations expired, the claim is barred and this case must be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

STANDARD OF REVIEW

The Defendants agree that appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*. Syl. Pt. 2, *State ex rel McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

ARGUMENT

In her Brief, the Plaintiff argues that the Circuit Court failed to apply the statute of repose for claims against persons or entities who have engaged in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property set forth in West Virginia Code § 55-2-6a (1983). Code Section 55-2-6a provides that a person may bring suit for damages for an injury to a person or for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property within ten years after the performance or furnishing of such services or

construction. The Plaintiff argues that this ten year statute of repose is applicable to the Plaintiff's claims against the Defendants and thus, the Plaintiff claims that the Amended Complaint was filed within the applicable time (ten years) to bring claims against these Defendants. In short, the Plaintiff argues that, "as the Plaintiffs filed their Amended Complaint in this matter prior to the expiration of the ten-year statute of repose for 'architects and builders' it has been timely filed and the dismissal should be reversed." Plaintiff's Brief, pp. 19-20.

However, the Plaintiff acknowledges, but fails to discuss, that the West Virginia Supreme Court has found that "pre-existing statute of limitations for both contract and tort actions continued to operate within the outside limits set by the statute." *Thomas v. Gray Lumber Co.*, 199 W. Va. 556, 563, 486 S.E.2d 142, 149 (1997) (per curiam) (citing *Gibson v. West Virginia Department of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991) and *Shirkey v. Mackey*, 184 W. Va. 157, 399 S.E.2d 868 (1990)). This means that the two year statute of limitations for personal injury found under W. Va. Code § 55-2-12 (1959) of the West Virginia Code is still applicable. For instance, if someone were to get injured from a defective or unsafe condition resulting from an improvement to real property, that injured plaintiff may sue the builder or architect within two years of their injury, but only if the injury occurs within ten years of the builder's or architect's performance of their services.

West Virginia Code Section 55-2-6a is meant to protect builders and architects from infinite liability. Thus, once a builder or architect completes improvements to property, they can only be liable for any dangerous conditions created by such improvements for ten years. Whether the statute of repose cited by the Plaintiff applies to the case at hand or not, the two-year statute of limitations is still applicable. Thus, our only concern is with whether the two year statute of limitations for personal injuries has been satisfied.

As stated above, under Section 55-2-12 of the West Virginia Code, an action for personal injury shall be brought within two years of the right to file suit (or in this case, the time of the injury). W. Va. Code § 55-2-12. Otherwise, the claim will be barred by the statute of limitations. In the case at hand, Mr. Muto was injured sometime during the evening hours of July 4, 2004. Thus, the statute of limitations in this case expired July 4, 2006, or two years after the time of the injury. On June 29, 2006, the Plaintiff filed a Complaint on behalf of her deceased husband and herself for the injuries he sustained. This June 29, 2006, Complaint named "John Doe Contractors, Architects, Consultants, Designers and Engineers for concrete work, construction, design, installation, excavation, and other aspects of building and construction" as Defendants in the case. No other parties were named as Defendants in the Plaintiff's June 29, 2006, Complaint.

On October 2, 2006, more than two months past the expiration of the statute of limitations for Mr. Muto's injury, the Plaintiff filed an Amended Complaint naming Larry Scott, L. Scott Ltd. Co., and Larado Construction Sales, LLC., as Defendants. Under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, a claim can be dismissed for failure to state a claim upon which relief can be granted. Even assuming that all of the allegations asserted in the Plaintiff's Complaint are correct, the Defendants in this case were sued after the expiration of the statute of limitations and therefore, the Plaintiff has failed to state a claim upon which relief can be granted and the case must be dismissed under Rule 12(b)(6).

Rule 15 of the West Virginia Rules of Civil Procedure permits a party to amend a complaint as a matter of course at any time before a responsive pleading is served. W. Va. R. Civ. P. 15(a). A pleading will relate back to the date of the original pleading under certain defined circumstances. Under Rule 15(c)(3) of the West Virginia Rules of Civil Procedure, a

pleading will relate back to the date of the original pleading when the amendment changes the party against whom a claim is asserted only if the following conditions are met:

(1) the claim asserted in the amended complaint arose out of the same conduct, transaction, or occurrence as that asserted in the original complaint;

(2) the defendant named in the amended complaint received notice of the filing of the original complaint and is not prejudiced in maintaining a defense by the delay in being named;

(3) the defendant named in the amended complaint either knew or should have known that he or she would have been named in the original complaint had it not been for a mistake; *and*

(4) notice of the action, and knowledge or potential knowledge of the mistake, was received by the defendant named in the amended complaint within the period prescribed for commencing an action and service of process of the original complaint, or 120 days.

Elam v. Med. Assurance of W. Va. Inc., 216 W. Va. 459, 464, 607 S.E.2d 788, 793 (2004) (*per curiam*) (emphasis added); *Brooks v. Isinghood*, 213 W. Va. 675, 685, 584 S.E.2d 531, 541 (2003). Contrary to the Plaintiff's assertions in her Brief, the Plaintiff's Amended Complaint should not relate back to the time of filing of the original Complaint. While the Defendants do not surrender their right to argue that other requirements under Rule 15(c)(3) have not been met, the Defendants respectfully argue that the Plaintiff has failed to meet the third requirement under Rule 15(c)(3), as delineated in *Elam* and *Brooks*.² Since all four requirements must be met in order for an amended complaint to relate back to the date of the original complaint, the Plaintiff's Amended Complaint in the case at hand will not relate back. Thus, since the Plaintiff's Amended Complaint was filed after the statute of limitations had expired, the claim is

² This argument is fully developed in this Brief and in the Defendants' Motion to Dismiss filed with the Circuit Court of Grant County. It is worth noting that the Plaintiff does not address this argument in her Brief.

barred, and this case against the Defendants must be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

The language of Rule 15(c)(3) requires that there be a mistake on a plaintiff's part in failing to name a defendant and that the defendant knew or should have known that he or she would have been named but for this mistake. W. Va. R. Civ. P. 15(c)(3). In the case at hand, there is no "mistake" on the part of the Plaintiff in failing to name the Defendants in her original Complaint. In analyzing this requirement of a mistake on the part of a plaintiff, most courts have held that a lack of knowledge regarding the identity of the proper party does not constitute a mistake. Rule 15(c) permits an amended complaint to relate back to the date of the original complaint in a case of mistake concerning the identity of the proper party, but does not permit relation back where there is a lack of knowledge of the proper party. *See, Locklear v. Bergman & Beving AB*, 457 F.3d 363, 36 (4th Cir. 2006) (Federal Rule 15³ is not satisfied when the claimed mistake consists of lack of knowledge of the proper party to be sued).

In creating a complaint, the plaintiff bears the burden of finding the proper defendant. *Schieszler v. Ferrum College*, 233 F. Supp. 2d 796, 802 (W.D. Va. 2002). Because a lack of knowledge of the true identity of a party does not qualify as a "mistake" under Rule 15(c)(3), an amended complaint which substitutes a proper defendant for a "John Doe" defendant does not relate back on the grounds of mistake. *Barnes v. Prince George's County*, 214 F.R.D. 379, 380-81 (D. Md. 2003). The Plaintiff states in her Brief that she did not replace the Defendants for "John Doe," but merely added the Defendants and kept the "John Doe" defendants. This is irrelevant, for it is clear that the Defendants were included in the "John Doe"

³ The pertinent parts of Federal Rule 15 and our Rule 15 are identical for the purposes of this action.

delineation in the Plaintiff's original Complaint. In the "Statement of the Case" section of the Plaintiff's Brief, the Plaintiff states that a complaint for negligence against Smoke Hole Cabins was initially filed. Plaintiff's Brief, p. 4. However, the Plaintiff claims that the Defendant in that matter was unwilling to provide pre-discovery identification of the contractors who had worked on, or were responsible for, the construction, design and condition of the canal where the injury allegedly occurred. *Id.* The Plaintiff then stated in her Brief that "Plaintiffs *therefore* filed their John Doe Complaint in the instant case" *Id.* (emphasis added). Plaintiff then states in her Brief, "Thereafter Plaintiffs, within five days of receipt of discovery responses identifying the Defendants . . . as the persons or entities responsible for portions of the design . . . amended [the] Complaint in the instant case to add the Defendants" *Id.* Thus, the Plaintiff admits in her Brief that because she lacked the knowledge of who the contractors, etc. were, she filed a John Doe Complaint, only to later identify the Defendants upon becoming aware of their identity through discovery in her case against Smoke Hole Cabins.

Relation back is not permitted under Rule 15(c) where there is a lack of knowledge of the proper party. The Plaintiff has admitted in her own Brief that she lacked the knowledge of the proper party, thereby causing her to identify the Defendants as "John Doe" defendants in her original Complaint. Thus, the Plaintiff's Amended Complaint does not relate back to the date of her original Complaint and because the Amended Complaint was filed after the expiration of the two year statute of limitations, the claim is barred and the Plaintiff's case against the Defendants must be dismissed.

While the federal cases cited above are not mandatory precedent that this Court must follow, it is important to note that Rule 15(c)(3) under the federal rules is identical to Rule 15(c)(3) under the West Virginia Rules and thus, the analysis of the rule by a federal court

should be analogous to that of this Court.⁴ Furthermore, when confronted with this issue, courts are nearly unanimous in finding that the mistake requirement under Rule 15(c)(3) is not met when a plaintiff substitutes a named defendant for a John Doe defendant in the original complaint. *See, e.g., Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1075 (2d Cir. 1993); *Jacobsen v. Osborne*, 133 F.3d 315, 321 (5th Cir. 1998); *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir. 1996); *Delgado-Burnet v. Clark*, 93 F.3d 339, 344 (7th Cir. 1996). Furthermore, in *Brooks*, the West Virginia Supreme Court cites to a law review article which states that, “in most other kinds of lawsuits [those other than suits brought against police or correctional officers, where a plaintiff’s ability to name the correct defendant is dependent upon the police department’s willingness to comply with discovery requests and supply the officer’s name], the plaintiff has alternative means of finding out the defendant’s true identity [aside from placing “John Doe” in the original complaint and then amending the complaint later on with the proper defendant’s name].” *Brooks*, 213 W. Va. at 684 n.6 and 540 at n.6. In the case at hand, the Plaintiff had the means and the responsibility of finding out the identity of the Defendants before the statute of limitations ran out, but did not do so. The Plaintiff admittedly lacked the knowledge of the identity of the proper party when she filed her original Complaint. The Plaintiff’s lack of knowledge is not considered as a mistake under Rule 15(c)(3). Thus, the Amended Complaint does not relate back to the date of the original Complaint. Because the Amended Complaint was filed after the statute of limitations had expired, the claim is barred and the Amended Complaint must be dismissed.

⁴ Federal Rule 15(c)(3) does contain a paragraph at the end discussing the delivery or mailing process to the United States Attorney, but this is not relevant for our purposes and the relevant and main parts of the Rule are exactly the same.

CONCLUSION


Whether the ten year statute of repose applies to this case is irrelevant, for regardless of whether it applies, the two year statute of limitations for personal injury found under Section 55-2-12 of the West Virginia Code is still applicable. Thus, our only concern is with whether the two year statute of limitations for personal injuries has been satisfied. Clearly, it has not. In the case at hand, because the Plaintiff's lack of knowledge regarding the identity of the proper defendants when the original Complaint was filed does not constitute a mistake under Rule 15(c)(3), the Amended Complaint does not relate back to the date of the original Complaint. Therefore, because the Amended Complaint was filed after the expiration of the statute of limitations, the claim is barred and this case must be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

PRAYER FOR RELIEF

WHEREFORE, based upon the rules and case law cited above, Defendants pray that the order of the Circuit Court of Grant County entered January 16, 2007, **AFFIRMED**.

Respectfully Submitted,

LARRY SCOTT,
L. SCOTT LTD. CO., and
LARADO CONSTRUCTION SALES,
LLC.
By Counsel.



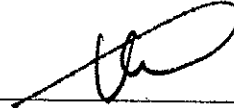
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CERTIFICATE OF SERVICE

I, Michael D. Lorensen, counsel for the Defendants, do hereby certify that I have served a true and correct copy of the foregoing **BRIEF OF DEFENDANT LARRY SCOTT, INDIVIDUALLY, AND L. SCOTT LTD. CO. AND LARADO CONSTRUCTION SALES, LLC** upon the below named individuals on the date indicated by depositing a true and correct copy of the foregoing in the United States Mail, first class postage prepaid, to them at their address as follows:

Julie Gower Romain, Esquire
21 Adams Street, Suite 600
Fairmont, West Virginia 26554

Dated this 10th day of September, 2006.



Michael D. Lorensen